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NO. 81-2363

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1981

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,
Petitioners

v.

TERRI LEE HALDERMAN, et al., PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, et al., and UNITED STATES OF AMERICA,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF PARC ET AL.

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August 20, 1982

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QUESTION PRESENTED

Whether concededly valid, unappealed and unstayed orders requiring a party to pay costs can be collaterally attacked in defense to a contempt proceeding or must be obeyed until and unless modified pursuant to Rule 60, Fed.R.Civ.P.?

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BRIEF IN OPPOSITION OF PARC ET AL.

Respondents the Pennsylvania Association for Retarded Citizens, Jo Suzanne Moskowitz, Robert Hight, David Preusch and Charles DiNolfi respectfully request that the Court deny the petition for writ of certiorari seeking review of the judgment

of the United States Court of Appeals for the Third Circuit in this case. The opinion below is reported at 673 F.2d 628.

STATEMENT

This is Commonwealth defendants' fourth petition for certiorari in litigation arising from the conditions of confinement Pennhurst State School and Hospital has imposed upon people who are retarded.* In this one they seek review of the en banc affirmance by the Court of Appeals for the Third Circuit of a finding of civil contempt and sanctions entered August 25, 1981 by District Judge Raymond J. Broderick against the Commonwealth of Pennsylvania Department of Public Welfare

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*Two eventuated in the decisions in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) and Youngberg v. Romeo, ___ U.S. ___ (June 18, 1982). The third petition was granted June 21, 1982 and is pending here as No. 81-2102.

and the Secretary of Public Welfare for disobedience of district court orders dated June 4, 1981 and July 14, 1981.

Petititioners conceded the validity of the underlying orders before both Courts below. (Petition, 61a, 68a) They conceded fair notice of the orders, the regularity of the contempt hearing and their disobedience of the Orders. The Orders of June 4, 1981 were unappealed. The Orders of July 14, 1981 were appealed, but the appeals were dismissed, 673 F.2d 645 (3d Cir. 1982) (en banc) and certiorari has not been sought. Neither order was ever stayed.

In defense of their disobedience of the orders, petitioners argued only that a post-judgment change in state law relieved them of any obligation to obey, a defense they sought to frame as an "impossibility" defense. The Court of Appeals

en banc held, however, that a post-judgment change in state law had to be raised by Rule 60(b) motion and not by disobeying orders and then collaterally attacking them in defense to a contempt proceeding.

The course of events which gave rise to Commonwealth defendants' contempt is set forth fully and fairly in the opinion of the Court of Appeals en banc, 673 F.2d 628 (46a to 86a).

REASON FOR DENYING THE WRIT

THE COURT OF APPEALS PROPERLY APPLIED THE SETTLED RULE THAT THE MERITS OF THE UNDERLYING ORDER MAY NOT BE CALLED INTO QUESTION IN A POST-JUDGMENT CIVIL CONTEMPT PROCEEDING

The requirement that modification of a valid court order be sought through a Rule 60(b) Motion rather than through what the Court of Appeals en banc aptly called "self-help" is hardly an "unprecedented procedural requirement"(Petition at 11),

but long-settled law, grounded in the most basic requirements of orderly judicial proceedings.

A final district court order may be altered only through appeal or through a motion for relief from judgment under Rule 60(b). Goland v. Central Intelligence Agency, 607 F.2d 339, 370 (D.C.Cir. 1978), cert. denied, 445 U.S. 927 (1980); Ackermann v. U.S., 340 U.S. 193 (1950). An order issued by a court of competent jurisdiction cannot be relitigated in a contempt proceeding. Oriel v. Russell, 278 U.S. 358 (1928); Walker v. City of Birmingham, 388 U.S. 307 (1967). As the Court wrote in Howat v. Kansas, 258 U.S. 181, 190 (1922),

> "It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based

> on its decision are to be respected, and disobedience of them is contempt of its lawful authority." (emphasis supplied)

Rule 60(b) vests in the district courts power "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." Klapprott v. United States, 335 U.S. 601, 615 (1949). That the standard for relief under Rule 60(b) is an exacting one, Ackermann v. United States, 340 U.S. 193 (1950), is no justification for resorting to "self-help" rather than the procedure prescribed in the Federal Rules. If a party could, through disobedience to a valid court order, achieve modification of that order more easily than by orderly review, there would be little incentive to comply with court orders, and finality in litigation would have little meaning.

While on appeal from a Rule 60(b)(6)

motion, the Court of Appeals is empowered to consider the merits of a party's contention that changed circumstances justify relief, the scope of review on an appeal from a civil contempt order is limited to inquiring whether the contempt order was properly entered. 9 Moore's Federal Practice ¶110.13[4]; Cabrera v. Municipality of Bayamon, 622 F.2d 4, 7 (1st Cir. 1980). Here, petitioners conceded the validity of the orders, that they had notice of those orders and that they failed to comply. Thus the Court of Appeals properly limited its review to the question whether the contemnor had in fact disobeyed the order.

The Court of Appeals' decision is consistent with the decision of this Court in Maggio v. Zeitz, 333 U.S. 56 (1948) and with the decision of the Second Circuit in NYSARC v. Carey, 631 F.2d 162 (2d Cir. 1980). In NYSARC v. Carey, the defendant

was found not in contempt because he had not in fact violated a consent decree which specifically provided that the Governor "take all steps necessary to ensure the full and timely financing of this judgment," 631 F.2d at 163. In that case, it was conceded that the Governor had done all in his power to secure the necessary financing, which was all the consent decree in that case required.

Of course, this Court has recognized that physical impossibility of performance may be a defense to contempt as Maggio v. Zeitz holds as to a party and Shillitani v. U.S., 384 U.S. 364, 373 (1966) and U.S. v. Bryan, 339 U.S. 323, 330 (1949) held as to non-parties. But those cases concern real physical impossibilities, parties who do not in fact have possession of the property or the documents. Here, as the Court of Appeals en banc pointed out,

petitioners faced no physical impossibility of compliance. There was no physical inability to pay the Masters' costs, as evidenced by the Commonwealth defendants' ability to pay $1,200,000 in civil fines.

Here, instead, Commonwealth defendants sought to transmute an asserted post-judgment change in state law ground for relief from orders into a defense of "legal impossibility." Correctly applying settled law against self-help contempts, the Court of Appeals en banc refused to sanction such a mutation as a general matter and particularly here where the asserted "legal impossibility" arose because "the contemnor participated in effectuating the change in the law which is alleged to establish a legal impossibility." 673 F.2d at 639 (71a-72a).*

*As to the post-judgment change in state law itself and whether, properly presented in orderly

(footnote continued)

Petitioners' concern (Petition at pp. 15-16) that procedural differences between Rule 60(b) and contempt proceedings would deprive them of a fair opportunity to raise their asserted legal inability to comply

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(footnote continued)
fashion by a Rule 60 Motion, it could have constituted a ground for relief from the judgment, a state may not undermine the settled rule that federal courts may charge costs to a state litigant by erecting state law barriers to the payment of such costs. Missouri v. Iowa, 7 How. (48 U.S.) 660, 681 (1849) (Masters' costs); Hutto v. Finney, 437 I.S. 678, 689-91, 695-96 (1978); Gary W. v. Louisiana, 441 F.Supp. 1121 (E.D. La. 1977), affirmed, 622 F.2d 804 (5th Cir. 1980), cert. denied, 450 U.S. 994 (1981); Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980); Collins v. Thomas, 649 F.2d 1203 (5th Cir. 1981).

Shapp v. Sloan, 480 Pa.449, 391 A.2d 595 (1978) is not to the contrary, for it did not concern a conflict between federal and state law and says explicitly, 391 A.2d at 606, that the result would be different if such a conflict were present, as the above-cited cases on federal court costs have held. Following Shapp, the Pennsylvania Commonwealth Court in Burd v. Commonwealth Department of Transportation, 443 A.2d 1197, 1198 (1982), refused to enter what it said would be a "classic confrontation between the federal and state judicial systems" and denied a request of several state legislators that the Pennsylvania Department of Transportation be enjoined from implementing a federal court decree on the ground that no funds had been appropriated by the legislature.

in a Rule 60(b) proceeding is misplaced. Petitioners misstate settled federal law regarding the allocation of the burden of proof on an affirmative defense to contempt. Where a valid court order is established and admitted, as here, the burden is on the alleged contemnor to show facts which will excuse his default. If the defense were one of inability to comply with an order, the defendant has the burden of proving the inability, that it is real, and not occasioned by his own acts. N.L.R.B. v. Trans Ocean Export Packing, Inc., 473 F.2d 612, 616 (9th Cir. 1973); Palmigiano v. Garrahy, 448 F.Supp. 659, 671 (D.R.I. 1978); United States v. Fleischman, 339 U.S. 349, 362-63 (1950). Even if petitioners had been allowed to raise an inability defense in the contempt proceeding, they still would have borne the burden of proof.

Furthermore, this Court has repeatedly held that on a Rule 60(b) motion sound judicial discretion calls for the modification of an injunctive decree if circumstances of law or fact (including subsequent legislative action) have changed so as to justify relief. Systems Federation No. 91, Railway Employees Department v. Wright, 364 U.S. 642, 650 (1961); State of Pennsylvania v. Wheeling & Belmont Bridge Company, 18 How. (59 U.S.) 421, 432 (1855). As to hearing, the case which petitioners invoke, Delaware Valley Citizens Council for Clean Air v. Commonwealth of Pennsylvania, 674 F.2d 976, 981 (3d Cir. 1982) (per Garth, J.), held only with respect to a consent decree that "[a] court may . . .be justified in rejecting, without affording an evidentiary hearing, a post-judgment attempt by a party to escape from obligations it had voluntarily assumed"

and that an evidentiary hearing is not required "when a court modifies a consent decree in a substantive manner which is contemplated by the decree itself."

CONCLUSION

For the above-stated reasons, Respondents the Pennsylvania Association for Retarded Citizens, four individual retarded people and the plaintiff class submit, this petition for writ of certiorari should be denied.

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**Counsel wish to acknowledge the contribution to this Brief of Judith A. Gran, a third-year student at Temple University School of Law.